

**A AudioVox Communication (M) Sdn Bhd & Anor v
Marina bte Abdul Majid**

HIGH COURT (KUALA LUMPUR) — CIVIL APPEAL NO R2–12–541 OF 2002
WAN AFRAH JC
B 16 AUGUST 2004

Civil Procedure — Judgments and orders — Setting aside — Judgment in default of defence — No irregularity in judgment — Whether appellant should have appealed to High Court instead of applying to set aside judgment — Whether session court had power to set aside judgment — Subordinate Court Rules 1980 O 1 r 4(1), O 29 r 14 & O 49 r 6, 6(3)
C

The respondent filed a claim against the appellants in the sessions court for misrepresentation and in the alternative, negligent misrepresentation, and claimed for specific damages. The case was first fixed for mention on 14 June 2002. On that date the two appellants had their respective set of solicitors.
D Both of them attended court before the respondent's solicitors arrived and obtained another mention date to file the appellants' statement of defence. On 8 July 2002, the first appellant's solicitors took over conduct from the second appellant's solicitors.

E When the matter was called up, the appellants' solicitors requested a short extension of time to file the statement of defence which they claimed was pending their client's approval. The sessions court judge denied the appellants' solicitors request and at the respondent's behest entered judgment in default of defence against the appellants. The appellants appealed against the session court's decision to enter judgment in default of defence. In addition, the
F appellant's have also filed an application to set aside the judgment in the sessions court although this had been stayed pending the outcome of this appeal. They have taken this course of action due to the High Court decision of *Mohamad Nazri bin Ali v Abdullah bin Sidek* [2000] 6 MLJ 355.

G The issue to be determined was whether the court ought to follow the decision of *Mohd Nazri* and should the court disagree with the decision in *Mohd Nazri* on what was the proper procedure to be adopted by the appellants in the sessions court to set aside judgment in default of defence entered against them.

H **Held**, striking out the appeal:

- (1) A reading of O 29 r 14 of the Subordinate Court Rules 1980 ('SCR'), uncluttered by any assumptions as to its intended effect, would show that it merely provided that where provisions were made for the setting
I aside or varying of an order or judgment then the applicant must make his application within 30 days of receipt of the judgment or order. This rule merely laid down time limitations where there are such enabling provisions.

So where there were no such provisions in existence to set aside or vary an order or judgment, it simply meant that no statutory or prescribed time limit applies (see para 8). However, that did not mean that where no prescribed time limit has been set, no time limit applies. The equitable doctrine of laches applies (see para 9).

- (2) Order 1 r 4(1) of the SCR was intended to be used when there is a procedural lacuna. Order 1 r 4(1) of the SCR read together with O 19 rr 2(1) and 9 of the Rules of the High Court 1980 is applicable as there is a procedural lacuna where the setting aside of the judgment in default of defence is concerned. However, there is no resort to the inherent jurisdiction of the court to facilitate such a setting aside application (see para 11).

- (3) Order 49 r 6(1) of the SCR appears to provide a procedure to set aside the judgment in default of defence. However the provision should not be understood merely on its sub-rule. Order 49 r 6 of the SCR should be considered holistically. When this is done, it becomes clear why although O 49 r 6 of the SCR provides a procedure, it is not a proper or efficacious one (see para 16). If O 49 r 6(3) of the SCR is observed, it envisages that the record of appeal 'shall' contain the application for the decision, the pleadings filed the relevant affidavits and the order (see para 17).

- (4) In the subordinate courts, where a plaintiff has entered judgment in default of defence, the procedure to set it aside would be for a defendant to file an application with a supporting affidavit explaining why the statement of defence could not have been filed within the prescribed time period and to show a defence on the merits. Such an application should be filed as soon as reasonably possible (see para 28).

- (5) Appealing to this court to set aside the judgment in default of defence was clearly improper and due to the peculiar circumstances of this case, the court would strike out the appeal and order that the sessions court hear the appellant pending application in the sessions court to set aside the default judgment both on the ground of whether the appellants have shown a defence on the merits and whether the default is irregular and ought to be set aside ex-debitio justiate (see para 33); *Mohamad Nazri bin Ali v Abdullah bin Sidek* [2000] 6 MLJ 355 not followed.

[Bahasa Malaysia summary]

Responden telah memfailkan satu tuntutan terhadap perayu-perayu di mahkamah sesyen kerana salah nyata dan secara alternatif, gambaran salah yang cuai, dan menuntut ganti rugi spesifik. Kes ini pada mulanya telah ditetapkan pada 14 Jun 2002. Pada tarikh itu kedua-dua perayu mempunyai peguamcara-peguamcara masing-masing. Kedua-duanya hadir di mahkamah sebelum peguamcara responden tiba dan mendapat tarikh sebutan lain untuk memfailkan pernyataan pembelaan. Pada 8 Julai 2002, peguamcara perayu pertama mengambilalih tugas peguamcara perayu kedua.

- A** Apabila perkara ini dipanggil, peguamcara perayu-perayu memohon lanjutan masa singkat untuk memfailkan pernyataan pembelaan yang mereka katakan sedang menunggu persetujuan anakguam mereka. Mahkamah sesyen telah menafikan permintaan peguamcara perayu-perayu dan atas permintaan responden telah memasukkan penghakiman ingkar pembelaan terhadap perayu-perayu.
- B** Perayu-perayu telah merayu terhadap keputusan mahkamah sesyen untuk memasukkan penghakiman ingkar pembelaan. Tambahan pula, perayu-perayu juga telah memfailkan satu permohonan untuk mengetepikan penghakiman di mahkamah sesyen meskipun ini digantung sementara menunggu keputusan rayuan ini. Tindakan ini diambil berdasarkan keputusan Mahkamah Tinggi *Mohamad Nazri bin Ali v Abdullah bin Sidek* [2000] 6 MLJ 355.
- C**

Persoalan yang perlu ditentukan adalah sama ada mahkamah patut mengikut keputusan *Mohd Nazri* dan jika mahkamah tidak bersetuju dengan keputusan dalam *Mohd Nazri* apakah prosedur yang betul untuk digunakan oleh perayu-perayu di mahkamah sesyen untuk mengetepikan penghakiman ingkar pembelaan yang dimasukkan terhadap mereka.

D

Diputuskan, membatalkan rayuan:

- E** (1) Dengan membaca A 29 k 14 Kaedah-Kaedah Mahkamah Rendah 1980 ('KMR'), tidak diselubungi oleh apa-apa andaian terhadap maksud yang diniatkan, akan menunjukkan bahawa ia hanya memperuntukkan bahawa di mana peruntukan telah dibuat untuk mengetepikan atau mengubah satu penghakiman maka pemohon hendaklah membuat permohonan beliau dalam tempoh masa 30 hari daripada penerimaan penghakiman atau perintah itu. Aturan ini hanya memperuntukkan had masa terhadap peruntukan sedemikian. Oleh itu di mana tiada peruntukan sedemikian untuk mengetepikan atau mengubah satu perintah atau penghakiman, ia bermaksud bahawa tiada penggunaan had masa statutori atau yang ditetapkan (lihat perenggan 8). Namun begitu, ini tidak bermakna di mana tiada had masa yang ditetapkan, tiada had masa yang terpakai. Doktrin ekuiti laches adalah terpakai (lihat perenggan 9).
- F**
- G**
- H** (2) Aturan 1 k 4(1) KMR berhasrat untuk digunakan apabila terdapat lakuna dalam prosedur. Aturan 1 k 4(1) KMR dibaca bersama A 19 kk 2(1) dan 9 Kaedah-Kaedah Mahkamah Tinggi 1980 adalah terpakai kerana terdapat lakuna dalam prosedur penepian penghakiman ingkar pembelaan. Bagaimanapun, tiada peruntukkan dalam bidang kuasa mahkamah yang sedia ada untuk memudahkan penepian permohonan sedemikian (lihat perenggan 11).
- I** (3) Aturan 49 k 6(1) KMR kelihatan seperti memperuntukkan satu prosedur untuk mengetepikan penghakiman ingkar pembelaan. Bagaimanapun peruntukan itu tidak patut difahami hanya sebagai aturan kecil. Aturan 49 k 6 KMR patut dipertimbangkan secara keseluruhannya. Dengan cara

ini, adalah jelas kenapa meskipun A 49 k 6 KMR memperuntukkan satu prosedur, ia bukan yang betul atau yang berkesan (lihat perenggan 16). Jika A 49 k 6(3) KMR diteliti, ia membayangkan yang rekod rayuan 'hendaklah' mengandungi permohonan untuk keputusan, pliding yang memfailkan affidavit-afidavit relevan dan perintah itu (lihat perenggan 17).

- (4) Di mahkamah bawahan, di mana plaintif telah memasuki penghakiman ingkar pembelaan, prosedur untuk mengetepikannya adalah di mana defendan memfailkan satu permohonan dengan affidavit sokongan menjelaskan kenapa pernyataan pembelaan tidak dapat difailkan dalam tempoh masa yang ditetapkan dan dengan menunjukkan satu pembelaan bermerit. Permohonan sedemikian hendaklah difailkan dengan seberapa segera yang boleh (lihat perenggan 28).

- (5) Dengan membuat rayuan ke mahkamah ini untuk mengetepikan penghakiman ingkar terhadap pembelaan itu adalah jelas tidak betul dan disebabkan keadaan khusus kes ini, mahkamah akan membatalkan rayuan agar mahkamah sesyen boleh mendengar permohonan perayu yang belum selesai di mahkamah sesyen untuk mengetepikan penghakiman ingkar atas alasan sama ada perayu-perayu telah menunjukkan pembelaan bermerit dan sama ada kegagalan itu di luar aturan dan patut diketepikan *ex debito justitiae* (lihat perenggan 33); *Mohamad Nazri bin Ali v Abdullah bin Sidek* [2000] 6 MLJ 355 tidak diikuti.]

Notes

For cases on setting aside of judgments and orders, see 2(2) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 3555–3561.

Cases referred to

Chin Choy & Ors v Collector of Stamp Duties [1979] 1 MLJ 69 (refd)
Fira Development Sdn Bhd v Goldwin Sdn Bhd [1989] 1 MLJ 40 (refd)
Goh Sook Kim dan satu lagi lwn Lee Wng Kooi dan satu lagi [2001] 6 MLJ 751 (refd)
Goh Teng Hoon & Ors v Choi Hon Ching [1987] 1 MLJ 95 (refd)
L Oppenheim & Co v Mahomed Haneef [1922] 1 AC 482 (refd)
Mohamad Nazri bin Ali v Abdullah bin Sidek [2000] 6 MLJ 355 (not folld)
Ng Hee Thoong & Anor v Public Bank Bhd [1995] 1 MLJ 281 (refd)
Pegasus Engineers Sdn Bhd v Sambu (M) Sdn Bhd [1998] 4 MLJ 129 (refd)
Perbadanan Nasional Insurant Sdn Bhd v Phua Lai Ong [1996] 3 CLJ 321 (refd)
Soon Keng Sdn Bhd v Low Chee Hoong & Ors [2001] 4 MLJ 238 (refd)
Yeo Peck Chie v KS Gill & Co [1946] MLJ 131 (refd)

Legislation referred to

Subordinate Court Act 1948 s 99A, Third Schedule
 Subordinate Court Rules 1980 O 1 r 4, (1), (2), O 3 r 5(3), O 14 r 5(3), r 21(1)(a), O 19 r 2, (1), r 9, O 24 r 4(2)(a), O 29 r 14, O 49 r 6, (1), (3), (4), O 53 r 11

- A** *Mubashir Mansor (Tan Joon Ho bersamanya) (Skrine) bagi pihak perayu-perayu. Rajadevan a/l Vamadevan (Joseph Mathews bersamanya) (Mathews & Associates) bagi pihak responden.*

Wan Afrah JC:

- B** [1] The respondent filed a claim against the appellants in the Kuala Lumpur sessions court for misrepresentation and in the alternative, negligent misrepresentation, and claimed for specific damages amounting to RM64,916.42.

C BRIEF FACTS

- D** [2] The case was first fixed for mention on 14 June 2002. On that date the two appellants had their respective set of solicitors. Both of them attended court before the respondent's solicitors arrived and obtained another mention date to file the appellants' statement of defence. On July 2002 the first appellant's solicitors took over conduct from the second appellant's solicitors. When the matter was called up on 22 July 2004, appellants' solicitors requested a short extension of time to file the statement of defence which they claimed was pending their client's approval. The sessions court judge denied the appellants' solicitors request and at the respondent's behest entered judgment in default of defence against the appellants.

- E** [3] What the appellants have done here is to appeal the session court's decision to enter judgment in default of defence. In addition, I was informed that the appellant's have also filed an application to set aside the judgment in the sessions court although this had been stayed pending the outcome of this appeal. They have taken this curious course of action due to the High Court decision of *Mohamad Nazri bin Ali v Abdullah bin Sidek* [2000] 6 MLJ 355.
- F**

ISSUES TO BE DETERMINED

- G** *A Whether the court ought to follow the decision of Mohd Nazri and should the court disagree with the decision in Mohd Nazri's case what is the proper procedure to be adopted by the appellants in the sessions court to set aside judgment in default of defence entered against them.*
- H** [4] In the decision of *Mohamad Nazri* it was decided that the correct procedure to be taken by a defendant against a judgment in default of defence is to appeal to the High Court and not by filing an application to set aside. Having considered this decision, I am with the greatest of respect unable to agree with it.
- I** [5] The respondent also took the stand that the appellant cannot file an application to set aside the default judgment for irregularity in the sessions court and to appeal on the defence of merits in the High Court.

[6] To my mind the waypoints in the reasoning behind *Mohamad Nazri* are as follows:

- (a) Judgment in default of defence was entered against the defendant pursuant to O 14 r 5(3) SCR. The learned judge noted, 'It is significant to observe that O 14 contains no provision as to the setting aside (for varying) of an order made under para (3)'.
- (b) The learned judge referred to O 29 r 14 SCR and interpreted the effect of this provision to mean '.... if, in respect of a judgment or order made by a subordinate court in respect of a civil matter, there is no provision in the Subordinate Court Rules for the setting aside (or the varying) of that order or judgment, as in the present case, then there is no recourse to setting aside (or varying) the same'.
- (c) Utilisation of O 1 r 4 SCR to apply O 19 rr 2 and 9 RHC was held not to apply 'merely because the SCR does not contain any provision for the setting aside by the magistrate's court of its judgment given in default of defence, it cannot be said that there is a lacuna in the SCR. To my mind, it is axiomatic that the absence of a corresponding provision in the SCR vis-a-vis the provision in the RHC cannot be a sufficient basis for determining whether or not there is a lacuna in the SCR. As I see it, there is no lacuna at all in the SCR'.
- (d) Inherent jurisdiction of the court does not apply; therefore s 99A SCA 1948 (read with Third Schedule) and O 53 r 11 SCR are not applicable because there is available procedure to set aside the decision.
- (e) The procedure is by way of an appeal pursuant to O 49 r 6 SCR.

[7] Whilst I am in agreement that O 14 r 5 SCR does not contain a provision to allow for the setting aside of a judgment in default of defence, I with respect do not agree with the interpretation cast upon O 29 r 14 SCR in *Mohamad Nazri*.

[8] A reading of O 29 r 14 SCR, uncluttered by any assumptions as to its intended effect, would show that it merely provides that where provisions are made for the setting aside or varying of an order or judgment then the applicant must make his application within 30 days of receipt of the judgment or order. This rule merely lays down time limitations where there are such enabling provisions. So where there are no such provisions in existence to set aside or vary an order or judgment, it simply means that no statutory or prescribed time limit applies.

[9] However, that does not mean that where no prescribed time limit has been set, no time limit applies. The equitable doctrine of laches is always present to guard against sloth.

- A** [10] O 29 r 14 SCR cannot be interpreted to have such an effect because the provision is not worded in such a fashion and does not imply such an effect; see *Chin Choy & Ors v Collector of Stamp Duties* [1979] 1 MLJ 69 at p 70 and *Yeo Peck Chie v KS Gill & Co* [1946] MLJ 131 at p 133. To interpret it in such a manner would be contrary to the manner in which the courts usually
- B** interpret procedural rules because it would increase the costs of litigation, if not prejudice the respondent altogether; see *Goh Teng Hoon & Ors v Choi Hon Ching* [1987] 1 MLJ 95 and O 1 r 4(2) SCR. This prejudice against the respondent that I allude to will become clearer in the later part of my judgment. My view turns on O 29 r 14 SCR. I now turn to O 1 r 4(1) SCR which provides as follows:
- C** (1) In any matter of procedure or practice not provided for in these rules, the procedures and practice for the time being in use or in force in the High Court shall, as near as may be, be followed and adopted.
- D** [11] A lacuna is defined as ‘an empty space or a missing part; a gap’; see *The American Heritage Dictionary of the English Language* (4th Ed). In law a lacuna is said to have arisen when there is a gap or lack of procedures or law governing something. It therefore appears obvious to me that O 1 r 4(1) SCR is intended to be used when there is a procedural lacuna.
- E** [12] I think that the lack of any rules providing the procedure to set aside a judgment in default of defence in the subordinate courts is a good example of a procedural lacuna. It is noted that whilst the learned judge admits that there are no provisions for such a procedure, then proceeds to deny that there is a procedural lacuna present.
- F** [13] His Lordship however gives no persuasive reason for explaining why this glaring lack of procedure in respect of setting aside a judgment in default of defence does not amount to a lacuna. All that is said on this matter is that just because there is a provision in the RHC when there is none in the SCR ‘cannot be a sufficient basis for determining whether or not there is a lacuna in the SCR’. However, his Lordship does not set out any guidelines as to how
- G** one is supposed to determine whether there is a lacuna in the SCR.
- [14] I would therefore agree with the respondent’s submission that O 1 r 4(1) SCR read together with O 19 rr 2(1) and 9 RHC is applicable as there is a procedural lacuna where the setting aside of the judgment in default of defence is concerned. However, I would tend to agree with the learned judge that there is no resort to the inherent jurisdiction of the court to facilitate such a setting aside application.
- H**
- I** [15] Now the learned judge has decided that O 49 r 6 SCR is the appropriate procedure and I gather that his Lordship was persuaded primarily by O 49 r 6(1) SCR which provides as follows: ‘Notwithstanding anything contained in this order, an appeal from any decision other than a decision made after trial by the court shall lie to a judge in chambers of the High Court’.

[16] Seen in that manner O 49 r 6(1) SCR appears to provide a procedure to set aside the judgment in default of defence. However the provision should not be understood merely on its sub-rule. I think that O 49 r 6 SCR should be considered holistically. When this is done, it becomes painfully clear why although O 49 r 6 SCR provides a procedure, it is not a proper or efficacious one.

A

[17] If O 49 r 6(3) SCR is observed, it envisages that the record of appeal 'shall' contain the application for the decision, the pleadings filed the relevant affidavits and the order. The use of the word 'and' between sub-para (c) and (d) of O 49 r 6(3) SCR is also important.

B

[18] The use of the word 'and' implies conjunctivity and means that all the documents have to be included; see *Pegasus Engineers Sdn Bhd v Sambu (M) Sdn Bhd* [1998] 4 MLJ 129. The use of the word 'shall' indicates that the presence of these documents are mandatory; see *Perbadanan Nasional Insurant Sdn Bhd v Phua Lai Ong* [1996] 3 CLJ 321.

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[19] What this clearly envisages is that a decision that would be appealed to the High Court is one made by way of a written application with relevant affidavits (the rare exception would be an application pursuant to O 14 r21(1)(a) SCR and arguments heard on the relevant application.

D

[20] Where a judgment has been entered in default of defence, the only thing that would be in the record of appeal is the notice of appeal, the summons and statement of claim, the notice of appearance and perhaps the judgment. This by itself reveals nothing about what transpired in the subordinate courts. It should also be noted that an appeal against such a decision would not satisfy the record of appeal requirements.

E

[21] Assuming for a moment that this is the correct procedure, there would be no basis for a defendant to argue the impropriety of the subordinate court judge's discretion because firstly, the record of appeal under O 49 r 6 SCR does not include the notes of proceedings or grounds of judgment; and secondly, anything factual said by the defendant or his counsel would be tantamount to giving evidence from the Bar and this is not allowed see *Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281.

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[22] A defendant would therefore be prohibited from arguing anything because there are no affidavits and would be unable to show cause why the statement of defence could not have been filed at the appointed time or whether he has a defence on the merits. This prohibition arises because there are no supporting affidavits for the court to peruse and provide a basis in the exercise of its discretion.

H

[23] A defendant undoubtedly suffers prejudice and the appeal amounts to nothing more than an affirmation of the subordinate court judge's decision. This is why I must confess to being non plussed as to why the appellants solicitors argued that O 49 r 6 SCR is the correct procedure to adopt to set aside a judgment in default of defence.

I

- A** [24] Of course it may be argued that the appellants can still sneak their supporting affidavits in by filing an application for stay of execution or the like and including the facts they think pertinent in the supporting affidavit; and then thereafter filing a notice of intention to use those affidavits. In fact, this is how the appellants tried to include their affidavits into the hearing of this appeal.
- B**
- C** [25] As ingenious as this tactic appears to be and as ‘appropriate’ as O 49 r6 SCR may be said to be, I cannot help but feel that to make this the procedure with which to set aside a judgment in default in the lower court would be time consuming, cost wasting and prejudicial to a defendant. It would also make a mockery out of O 1 r 4(2) SCR which is the guiding principle in interpreting procedural rules.
- D** [26] In any event, in an appeal under O 49 r 6 SCR, a judge should only decide on the issues that are contained in the record of appeal and cannot refer to anything else. If any other evidence, affidavit or otherwise, is sought to be brought before the appeal, then it must first satisfy the requirements in O 49 r 6(4) SCR. This cannot be circumvented with a mere notice of intention to use affidavits in an application filed in the same suit.
- E** [27] Although there were no serious arguments canvassing whether or not the sessions court judge was *functus officio* in hearing an application to set aside a judgment in default, I think it relevant for completeness sake to conclude that I am of the view that it would not apply. This is because a default judgment is never obtained on the merits (see *Goh Sook Kim dan satu lagi lwn Lee Wng Kooi dan satu lagi* [2001] 6 MLJ 751 and also *Fira Development Sdn Bhd v Goldwin Sdn Bhd* [1989] 1 MLJ 40 which cited *L Oppenheim & Co v Mahomed Haneef* [1922] 1 AC 482 approvingly) nor was any evidence led (and even if it was, it still can be set aside (see *Soon Keng Sdn Bhd v Low Chee Hoong & Ors* [2001] 4 MLJ 238).
- F**
- G** [28] Therefore in the subordinate courts, where a plaintiff has entered judgment in default of defence, the procedure to set it aside would be for a defendant to file an application with a supporting affidavit explaining why the statement of defence could not have been filed within the prescribed time period and to show a defence on the merits. Needless to say, such an application should be filed as soon as reasonably possible.
- H** [29] However, ideally, what should be done in this case is for the appellant’s lawyers to call the respondent’s lawyers before the prescribed time limit for filing a defence and ask whether they have any objection to a further extension of time. If the respondent’s lawyers are agreeable then they can invoke O 3 r5(3) SCR.
- I** [30] If the respondent’s lawyers have indicated that they are not agreeable with such an extension of time or give no indication whether or not they agree, then the appellant’s solicitors should proceed to immediately file an application

for an extension of time to file the statement of defence. They should not risk coming to court and applying orally for an extension of time because the sessions court judge is not obliged to allow it.

[31] There is no excuse why such an application for extension of time could not have been filed earlier. A foreseeable argument is that it takes time for the appellant's solicitors to prepare the supporting affidavit for the application. However, this argument would be without merit because the application can be filed first and the supporting affidavit later; see O 24 r 4(2)(a) SCR.

[32] If this were done, then I feel certain the occurrences of an application to set aside a judgment in default of defence would be significantly reduced.

[33] Much argument has been made by the parties about the merits of the defence but at present it is unnecessary for me to consider the same. Appealing to his court to set aside the judgment in default of defence is clearly improper and due to the peculiar circumstances of this case, I would therefore strike out the appeal and that the sessions court hear the appellant pending application in the sessions court to set aside the default judgment both on the ground of whether the appellants have shown a defence on the merits and whether the default is irregular and ought to be set aside *ex-debitio justiate*. Each party to bear its own costs.

Appeal struck out.

Reported by Peter Ling

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